SUPREME COURT, U. S.
MAY 18 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1728

JAMES SPENCER DUNN,
Petitioner,

vs.

UNITED STATES
IMMIGRATION & NATURALIZATION SERVICE,
Respondent.

Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PAUL C. VALENTINE
400 Channing Avenue
Palo Alto, California 94302
Attorney for Petitioner

GEORGE C. FISHER
SPAETH, BLASE, VALENTINE & KLEIN
A Professional Corporation
400 Channing Avenue
Palo Alto, California 94302
Of Counsel

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement of the case	4
Reasons for granting the writ	7
Conclusion	10
Appendices	

TABLE OF AUTHORITIES CITED

Cases

	Pages
Brandt v. Hickel, 427 F.2d 53, (9th Cir., 1970)	10
Gestuvo v. District Dir. of U.S. Immigration & Nat. Serv., (C.D. Cal. 1971) 337 F.Supp. 1093	8, 9, 10
Lee You Foe v. Dulles, 236 F.2d 885 (7th Cir., 1956)	8
Montana v. Kennedy, 366 U.S. 308; 81 S.Ct. 1336; 6 L.Ed.2d 313 (1961)	7
Peignand v. Immigration and Naturalization Service, 440 F.2d 757 (1st Cir., 1971)	8
Podea v. Acheson, 179 F.2d 306 (2nd Cir., 1950)	8
Talonoa v. Immigration and Naturalization Service, 397 F.2d 196 (9th Cir., 1968)	7, 8
United States Immigration and Naturalization Service v. Hibi, 414 U.S. 5; 94 S.Ct. 19 38 L.Ed.2d 7 (1973)	9
United States v. Ryba, 441 F.2d 1137 (3rd Cir., 1971) Cert. denied (1971) 404 U.S. 855	9

Statutes

Immigration & Nationality Act, Sec. 212(a)22	2
8 U.S.C.:	
§ 454(a)	5
§ 1105(a)	6

Regulations

Presidential Proclamation No. 2914, 3CFR99 (1949-1953 Comp.)	2

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

JAMES SPENCER DUNN,
Petitioner,

vs.

UNITED STATES
IMMIGRATION & NATURALIZATION SERVICE,
Respondent.

Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

Petitioner prays that a writ of certiorari issue to review an order of the United States Court of Appeals for the Ninth Circuit entered in this action on February 20, 1974, affirming the issuance by Immigration & Naturalization Service of deportation order of Petitioner James Spencer Dunn.

OPINIONS BELOW

The Order of Affirmance issued by the Court of Appeals is printed in Appendix A.

JURISDICTION

The Order of Affirmance was issued by the Court of Appeals for the Ninth Circuit without hearing oral argument and was filed and entered on February 20, 1974.

Orders Staying Issuance of Mandate pending filing, consideration and disposition of a petition for writ of certiorari to this Court were filed and entered on March 14 and April 15, 1974.

This Court has jurisdiction pursuant to Section 1254(1) of Title 28 of the United States Code.

QUESTIONS PRESENTED

Petitioner is a young man who immigrated to this country from Canada with his parents in 1953. Through a series of events which began in 1966, petitioner was indicted in 1968 for refusing to submit to induction into the Armed Forces. Petitioner pleaded guilty, with the understanding that if he so pleaded he would not be deported, and was sentenced to six (6) months in jail and eighteen (18) months public service. Petitioner completed his sentence and the conditions of probation.

The Immigration & Naturalization Service now seeks to deport him on the grounds he is not a permanent resident alien and that he left the country to avoid military service in time of war or period declared by the President to be a national emergency.*

---

*Section 212(a)22 of the Immigration & Nationality Act refers to aliens who avoid or evade training or service in the Armed Forces "in time of war or a period declared by the President to be a national emergency". The United States was not involved in a war or in a period declared by the President to be a national emergency in September of 1966, when Petitioner left the country for a period of less than a month. The last declaration of national emergency was December 16th, 1950, by Harry Truman in reference to the Korean situation. (Presidential Proclamation No. 2914, 3CFR99 (1949-1953 Comp.)) Since that national emergency has ended and no other war or national emergency has been declared by Congress or the President, Section 212(a)22 is not applicable with respect to Dunn's deportation.

Under these circumstances, the question presented is whether as a result of the conflicting, misleading and prejudicial collective governmental action of the Department of Justice, the Selective Service System, and the Immigration & Naturalization Service, outlined below, the government should now be estopped from deporting Petitioner:

1. Petitioner immigrated to the United States in 1953 and became a permanent resident alien;

2. In August, 1966, Petitioner left the United States under such circumstances that the Immigration & Naturalization Service determined in 1971 that he abandoned his permanent residence;

3. In September, 1966, Petitioner voluntarily returned to the United States and subsequently was indicted for refusal to submit to induction into the Armed Forces, and was induced to plead guilty based on advice to him from a Federal Public Defender that the Office of Attorney General, Department of Justice, had agreed that if Petitioner did plead guilty, as charged, he would not be deported;

4. In September, 1966, at the time of Petitioner's refusal to submit to induction, if the Petitioner was a non-permanent resident alien, he was entitled to exemption from induction into the Armed Forces; but Petitioner was not informed he was a non-permanent resident alien or that the exemption was available to him;

5. In 1968, Petitioner was sentenced to two years in jail, of which eighteen (18) months would be suspended upon condition that Petitioner accept work of national importance;

6. Petitioner served six (6) months in jail and completed probation by performing eighteen (18) months of work of national importance; and

7. Now, in 1974, Immigration & Naturalization Service seeks to deport Petitioner on grounds that Petitioner is

not now a permanent resident, and is excludable as an alien who departed from the United States to avoid service in the Armed Forces in time of war or period declared by the President to be a national emergency.

STATEMENT OF THE CASE

James Spencer Dunn, Petitioner, was born in Montreal, Canada, October 17, 1944 (R. 85)*. Dunn immigrated to the United States with his parents in 1953 and was lawfully admitted for permanent residence at that time (R. 87-88).

Dunn registered under the Selective Service Act on his eighteenth birthday (R. 89). On August 29, 1966, he received a notice to report for induction into the United States Army at Wheaton, Illinois, on September 28, 1966 (R. 110; 113). On September 6, 1966, Dunn left the United States and entered Canada at Vancouver, British Columbia (R. 51-52; 57-58). Dunn then held very strong views about the morality of war and did not believe in killing people (R. 117; 92-93). In a brief fit of pique, Dunn turned in his Alien Immigration Card to the Immigration Office at Vancouver, British Columbia (R. 50), but expressly refused to sign an oath or formal renunciation of his permanent residence. On September 28, 1966, the day he was scheduled to be inducted into the Army, Dunn reported to his draft board by telephone that while he would not permit himself to be inducted, he had changed his mind and would not avoid the law of the United States (R. 94; 110; 62) and would turn himself in to the United States Attorney and stand trial (R. 94-95). His draft board informed him that the situation was "out of their hands" (R. 110; 62).

---

*In this Petition, the Certified Administrative Record of the Board of Immigration Appeals is cited as "(R. .....)".

On October 3, 1966, Dunn flew to Chicago and turned himself in to the United States Attorney General's Office (R. 110; 62; 94-95). The United States Attorney's Office advised him that there was nothing they could do with his case at that time and that he should telephone their office in about three weeks (R. 110). After his report to the Attorney General's Office in Chicago, Dunn returned to Vancouver to retrieve his personal belongings (R. 63).

Dunn then returned to Chicago and reported to the United States Attorney's Office, as he had been directed to do (R. 62-63); and when that office indicated no immediate action, Dunn informed the office that he was then re-enrolling at Stanford University (R. 63).

Dunn then re-enrolled at Stanford University where he remained until July 10, 1968, when he was indicted for his refusal to submit to induction into the Armed Forces. Dunn had, in fact, reported for induction but had refused to submit to induction (R. 122). Dunn, at that time, was represented by the Federal Public Defender, who advised Dunn that he had been assured by the Attorney General (R. 64) that if he would plead guilty as charged and serve time to satisfy the conditions of the Court, he would not be deported (R. 64).

A critical fact in his case is that at this time, Dunn did not know, and was not advised either by his attorney, the Selective Service System, or the Department of Justice, that the Immigration & Naturalization Service would consider him to be a non-permanent resident alien at all times after August, 1966, and as a non-permanent resident alien he was eligible for exemption from induction under 8 U.S.C. § 454(a), the pertinent provision of the Selective Service Act then in effect (Appendix B).

Nevertheless, based on the representation of the Federal Public Defender, Dunn pleaded guilty and was sentenced to two years imprisonment, eighteen (18) months of which would be suspended on condition that he accept work of national importance (R. 122). He served a six (6) month term at McNeil Island Federal Penitentiary and completed the conditions of his probation in 1970.

Then, to his shock and surprise, on April 21, 1971, Dunn was served with a Notice to Show Cause by the Immigration & Naturalization Service as to why he should not be deported (R. 79). A hearing was held July 7, 1971; and on September 2, 1971, Dunn was ordered deported by the Special Inquiry Officer on the grounds that he was deportable as an immigrant without a valid visa, and because he had departed from the United States in September, 1966, to avoid training or service in the Armed Forces of this country (R. 43).

The case was appealed to the Board of Immigration Appeals. On June 18, 1972, the appeal was dismissed. The Board found that the hearing had been fair and that there was clear, convincing and unequivocal evidence to support the Deportation Order issued by the Special Inquiry Officer.

The Board specifically found no merit to Dunn's argument that the Immigration & Naturalization Service should be estopped to deport him because of these facts and circumstances.

Review of the decision of the Board of Immigration Appeals, under 8 U.S.C. § 1105(a) was sought in the United States Court of Appeals for the Ninth Circuit. On February 20, 1974, the Court issued an Order of Affirmance (Appendix A). The Court held that while this was a case in which the administrative discretion vested in the Immigration & Naturalization Service might have been exercised

with a greater compassion, the facts did not indicate a basis for applying an estoppel against the government.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it involves a special and important question of Federal law as to the facts and circumstances that warrant estoppel against the Federal government as a result of confusing, misleading and prejudicial actions by administrative agencies.

There is a conflict in the Circuit Courts of Appeal as to this question of Federal law and the guidelines should be settled by this Court.

In the Order of Affirmance issued February 20, 1974 (Appendix A), the Court of Appeals for the Ninth Circuit ruled that the facts before the Court indicated no basis for applying an estoppel against the government, citing *Talonoa v. Immigration and Naturalization Service*, 397 F.2d 196 (9th Cir., 1968).

In *Talonoa*, the Court of Appeals did not decide whether or not an estoppel could exist against the United States or against a government agency. The Court of Appeals in the *Talonoa* case followed *Montana v. Kennedy*, 366 U.S. 308; 81 S.Ct. 1336; 6 L.Ed.2d 313 (1961):

> "(After summary of facts) In this situation, we need not stop to inquire whether, as some lower courts have held, there may be circumstances in which the United States is estopped to deny citizenship because of a conduct of its officials." 366 U.S. at 315; 81 S.Ct. at 1341.

The lower courts referred to in *Montana v. Kennedy* were the Courts of Appeal in the Second Circuit and the Seventh Circuit which have invoked an estoppel against

the government as the result of erroneous advice given by State Department officials. *Podea v. Acheson*, 179 F.2d 306 (2nd Cir., 1950); *Lee You Fee v. Dulles*, 236 F.2d 885 (7th Cir., 1956).

The First Circuit, in *Peignand v. Immigration and Naturalization Service*, 440 F.2d 757 (1st Cir., 1971), followed *Talonoa:*

> "The doctrine of estoppel, assuming it can operate at all against the government, *cf. Montana v. Kennedy*, 366 U.S. 308, 318; 81 S.Ct. 1336, is not applicable here. The respondent did not lead petitioner to any course of action which he would not otherwise have taken or lead him to change his situation in any way whether to his detriment or otherwise." *Talonoa v. Immigration and Naturalization Service*, 397 F.2d 196 (9th Cir., 1968)

The doctrine establishing an estoppel against officers of the Immigration & Naturalization Service as enunciated in *Gestuvo v. District Dir. of U.S. Immigration & Nat. Serv.*, (C.D. Cal. 1971) 337 F.Supp. 1093, applies in this case. In that case, the Service was estopped from an arbitrary finding that the applicant was not entitled to revalidation of permanent residency status:

> "It was the Service that led Gestuvo down the path towards permanent residence. Having done so, it should not have shoved him into the ditch along the way..." 337 F.Supp. 1103.

The reasoning of the District Court in *Gestuvo* is applicable here.

The requirements for estoppel are clearly satisfied. The United States knew that Dunn had turned in his alien registration card in 1966 (R. 82). However, the government made no effort to notify Petitioner that it did not consider him to be a permanent resident alien until this proceeding

was initiated five years later. Dunn did not know that he was no longer a permanent resident. He expressly refused to sign an oath or written statement of renunciation to that effect.* He made no attempt to use a non-permanent resident status to avoid serving in the Armed Forces or to avoid criminal prosecution. He reasonably believed that he was being prosecuted as a permanent resident alien required by law to be inducted. He refused on moral grounds and he never tried to change his status to avoid incarceration.

The acts of the government in prosecuting Petitioner, finding him guilty and sentencing him for a crime with which he would only be charged as a permanent resident, then seeking to deport Petitioner as a non-permanent resident are sufficient acts of "affirmative misconduct" to warrant estopped. See *United States Immigration and Naturalization Service v. Hibi*, 414 U.S. 5; 94 S.Ct. 19; 38 L.Ed. 2d 7 (1973)

The United States should be estopped because of its unconscientiousness. As stated in the *Gesturo* case:

> "It is no easy task for a nation of 200,000,000 people to govern itself in a manner consistent with democratic principles. Congress has attempted to do so by establishing large, bureaucratic agencies to administer national policies. Efficient administration of these policies requires that decisions taken by agency officials after careful deliberation be subject only to limited judicial review. See 5 U.S.C. Sec. 706. Nevertheless, 'the requirements of morals and justice' demand that our administrative agencies be accountable for their mistakes. *Detrimental reliance on their misrepresentations*

*In *United States v. Ryba*, 441 F.2d 1137, 1139 (3rd Cir., 1971), Cert. denied (1971) 404 U.S. 855, the court held that permanent resident status could not be changed without an authorized procedure and questioned whether a permanent resident status could be changed by the action of an agency charged with the administration of immigration laws.

or mere unconscientiousness should create an estoppel, at least in cases where no serious damage to national policy would result." (emphasis added) (337 F.Supp. 1101).

In *Brandt v. Hickel,* 427 F.2d 53, (9th Cir., 1970), the court held that the Secretary of the Interior was estopped from contradicting assurances given plaintiff by local officials.

It is clear that the main concern of both the *Brandt* and the *Gesture* cases is a fundamental recognition of fairness. In the *Brandt* case, the court noted:

> "Yet some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the misstatements." (427 F.2d at 56-57)

Succinctly put by the Court in the *Brandt* case:

> "To say to these Appellants 'The joke is on you: you shouldn't have trusted us' is hardly worthy of our great government." (427 F.2d at 57)

CONCLUSION

For reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL C. VALENTINE
400 Channing Avenue
Palo Alto, California 94302
Attorney for Petitioner

GEORGE C. FISHER
SPAETH, BLASE, VALENTINE & KLEIN
A Professional Corporation
400 Channing Avenue
Palo Alto, California 94302
Of Counsel

(Appendices Follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 72-2186

James Spencer Dunn,
Petitioner,

vs.

Immigration & Naturalization Service,
Respondent.

[February 20, 1974]

ORDER OF AFFIRMANCE

Before: KOELSCH, WRIGHT, and SNEED, Circuit Judges

Dunn appeals from a decision of the Board of Immigration Appeals ordering his deportation under 8 U.S.C. §§ 1182(a)(20) and (22). While this is a case in which the administrative discretion vested in the Immigration and Naturalization Service might have been exercised with greater compassion, the scope of our review in this area is extremely narrow. We may suspend a deportation order only if the decision of the Immigration Service is without "reasonable foundation." *Khalil v. District Director*, 457 F.2d 1276 (9th Cir., 1972). The facts before us indicate no basis for applying an estoppel against the government. *Talonoa v. Immigration and Naturalization Service*, 397 F.2d 196 (9th Cir., 1968). Furthermore, our review of the record convinces us that deportation is warranted under 8 U.S.C. §§ 1182(a)(20) and (22).

AFFIRMED.

Appendix B

8 U.S.C. § 454(a) provided as follows prior to amendment of September 28, 1971 (emphasis added):

§ 454. Persons liable for training and service

(a) Age limits; training in National Security Training Corps; physical and mental fitness; adequate training facilities; assignment to stations and units; training period; medical specialist categories

Except as otherwise provided in this title [sections 451, 453, 454, 455, 456 and 458—471 of this Appendix], every male citizen of the United States and every male alien admitted for permanent residence, who is between the ages of 18 years and 6 months and 26 years, at the time fixed for his registration, or who attains the age of 18 years and 6 months after having been required to register pursuant to section 3 of this title [section 453 of this Appendix], or who is otherwise liable as provided in section 6(h) of this title [section 456(h) of this Appendix], shall be liable for training and service in the Armed Forces of the United States: *Provided,* That each registrant shall be immediately liable for classification and examination, and shall, as soon as practicable following his registration, be so classified and examined, both physically and mentally, in order to determine his availability for induction for training and service in the Armed Forces: *Provided further,* That, notwithstanding any other provision of law, any registrant who has failed or refused to report for induction shall continue to remain liable for induction and when available shall be immediately inducted: *Provided further,* That any male alien who is between the ages of 18 years and 6 months and 26 years, at the time fixed for registration, or who attains the age of 18 years and 6 months after having been required to register pursuant to section 3 of this title [section 453

of this Appendix], or who is otherwise liable as provided in section 6(h) of this title [section 456(h) of this Appendix], who has remained in the United States in a status other than that of a permanent resident for a period exceeding one year (other than an alien exempted from registration under this title [sections 451, 453, 454, 455, 456 and 458—471 of this Appendix] and regulations prescribed thereunder) shall be liable for training and service in the Armed Forces of the United States, except that any such alien shall be relieved from liability for training and service under this title [said sections] if, prior to his induction into the Armed Forces he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any alien who makes such application shall thereafter be debarred from becoming a citizen of the United States. The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States for training and service in the manner provided in this title [said sections] (including but not limited to selection and induction by age group or age groups) such number of persons as may be required to provide and maintain the strength of the Armed Forces.

At such time as the period of active service in the Armed Forces required under this title [sections 451, 453, 454, 455, 456 and 458—471 of this Appendix] of persons who have not attained the nineteenth anniversary of the day of their birth has been reduced or eliminated pursuant to the provisions of section 4(k) of this title [subsection (k) of this section], and except as otherwise provided in this title [sections 451, 453, 454, 455, 456 and 458—471 of this Appendix], every male citizen of the United States who is required to register under this title [said sections], and who has not attained the nineteenth anniversary of the day of his birth

on the date such period of active service is reduced or eliminated, or who is otherwise liable as provided in section 6(h) of this title [section 456(h) of this Appendix], and every male alien admitted for permanent residence who is required to register under this title [sections 451, 453, 454, 455, 456 and 458—471 of this Appendix], and who has not attained the nineteenth anniversary of the day of his birth on the date such period of active service is reduced or eliminated, or who is otherwise liable as provided in section 6(h) of this title [sections 456(h) of this Appendix], shall be liable for training in the National Security Training Corps: *Provided*, That any male alien who is required to register under the provisions of this title [sections 451, 453, 454, 455, 456 and 458—471 of this Appendix], and who has not reached the nineteenth anniversary of the date of his birth on the date such period of active service is reduced or eliminated, or who is otherwise liable as provided in section 6(h) of this title [section 456(h) of this Appendix], who has remained in the United States in a status other than that of a permanent resident for a period exceeding one year shall be liable for training in the National Security Training Corps except that any such alien shall be relieved from such training under this title [sections 451, 453, 454, 455, 456 and 458—471 of this Appendix] if, prior to his induction into the National Security Training Corps he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any alien who makes such application shall thereafter be debarred from becoming a citizen of the United States: *Provided further*, That persons deferred under the provisions of section 6 of this title [section 456 of this Appendix] shall not be relieved from liability for induction into the National Security Training Corps solely

by reason of having exceeded the age of nineteen years during the period of such deferment. The President is authorized, from time to time, whether or not a state of war exists, to select and induct for training in the National Security Training Corps as hereinafter provided such number of persons as may be required to further the purposes of this title [sections 451, 453, 454, 455, 456 and 458—471 of this Appendix].

No person shall be inducted into the Armed Forces for training and service or shall be inducted for training in the National Security Training Corps under this title [sections 451, 453, 454, 455, 456 and 458—471 of this Appendix] until his acceptability in all respects, including his physical and mental fitness, has been satisfactorily determined under standards prescribed by the Secretary of Defense: *Provided*, That the minimum standards for physical acceptability established pursuant to this subsection shall not be higher than those applied to persons inducted between the ages of 18 and 26 in January 1945: *Provided further*, That the passing requirement for the Armed Forces Qualification Test shall be fixed at a percentile score of 10 points: *And provided further*, That except in time of war or national emergency declared by the Congress the standards and requirements fixed by the preceding two provisos may be modified by the President under such rules and regulations as he may prescribe.

No persons shall be inducted for such training and service until adequate provision shall have been made for such shelter, sanitary facilities, water supplies, heating and lighting arrangements, medical care, and hospital accommodations for such persons as may be determined by the Secretary of Defense or the Secretary of the Treasury to be essential to the public and personal health.

The persons inducted into the Armed Forces for training and service under this title [sections 451, 453, 454, 455, 456 and 458—471 of this Appendix] shall be assigned to stations or units of such forces. Persons inducted into the land forces of the United States pursuant to this title [said sections] shall be deemed to be members of the Army of the United States; persons inducted into the Naval forces of the United States pursuant to this title [said sections] shall be deemed to be members of the United States Navy or the United States Marine Corps or the United States Coast Guard, as appropriate; and persons inducted into the air forces of the United States pursuant to this title [said sections] shall be deemed to be members of the Air Force of the United States.

Every person inducted into the Armed Forces pursuant to the authority of this subsection after the date of enactment of the 1951 Amendments to the Universal Military Training and Service Act [June 19, 1951] shall, following his induction, be given full and adequate military training for service in the armed force into which he is inducted for a period of not less than four months, and no such person shall, during this four months' period, be assigned for duty at any installation located on land outside the United States, its Territories and possessions (including the Canal Zone): *Provided,* That no funds appropriated by the Congress shall be used for the purpose of transporting or maintaining in violation of the provisions of this paragraph any person inducted into, or enlisted, appointed, or ordered to active duty in, the Armed Forces under the provisions of this title [sections 451, 453, 454, 455, 456 and 458—471 of this Appendix].

No person in the medical, dental, and allied specialist categories shall be inducted under the provisions of this

subsection if he applies or has applied for an appointment as a Reserve officer in one of the Armed Forces in any of such categories and is or has been rejected for such appointment on the sole ground of a physical disqualification.

No person, without his consent, shall be inducted for training and service in the Armed Forces or for training in the National Security Training Corps under this title [sections 451, 453, 454, 455, 456 and 458—471 of this Appendix], except as otherwise provided herein, after he has attained the twenty-sixth anniversary of the day of his birth.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 24 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1728

JAMES SPENCER DUNN,
Petitioner,
vs.
UNITED STATES
IMMIGRATION & NATURALIZATION SERVICE,
Respondent.

Additional Appendices to Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PAUL C. VALENTINE
400 Channing Avenue
Palo Alto, California 94302
Attorney for Petitioner

GEORGE C. FISHER
SPAETH, BLASE, VALENTINE & KLEIN
A Professional Corporation
400 Channing Avenue
Palo Alto, California 94302
Of Counsel

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

Appendix C

UNITED STATES DEPARTMENT OF JUSTICE

Board of Immigration Appeals

File: A8 464 157—San Francisco
In re: JAMES SPENCER DUNN

Jun 19 1972

IN DEPORTATION PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENT: George C. Fisher, Esquire
Spaeth, Blase, Valentine & Klein
400 Channing Avenue
Palo Alto, California 94302
(Brief filed)

ON BEHALF OF I&N SERVICE: Bernard J. Hornbach
Trial Attorney
(Brief filed)

CHARGES:

Order: Section 241(a)(1), I&N Act (8 U.S.C. 1251 (a)(1))—Excludable at time of entry —no immigrant visa—section 212(a) (20), I&N Act (8 U.S.C. 1182(a)(20))

Section 241(a)(1), I&N Act (8 U.S.C. 1251 (a)(1))—Departed to avoid training or service in armed forces—section 212(a)(22), I&N Act (8 U.S.C. 1182 (a) (22))

Lodged: None

APPLICATION: Termination of proceedings or in alternative, voluntary departure

This is an appeal from an order of the special inquiry officer finding the respondent deportable as charged in the Order to Show Cause. His application for voluntary depar-

ture was denied and an order of deportation entered. The appeal will be dismissed.

The respondent, a 27-year-old native and citizen of Canada, was admitted to the United States for permanent residence at Detroit, Michigan on April 8, 1953. His Selective Service Board ordered him to report for induction on September 28, 1966. He informed the Board on August 30, 1966 that he would not comply with the order because he felt that "conscription is amoral and totally unjustified" (Ex. 4). He departed for Canada on September 2, 1966.

The respondent appeared at the office of the Immigration and Naturalization Service at Vancouver, B.C., Canada on September 6, 1966 and advised that he was abandoning his permanent residence in the United States. He surrendered his alien registration receipt card (Form I-151). Following the surrender of his alien registration receipt card, the respondent returned to the United States on several occasions. He was indicted in the United States District Court for the Northern District of California for violation of Title 50, Appendix U.S.C. section 462—Refused to Submit to Induction. He was convicted on September 6, 1968 upon a plea of guilty and sentenced to imprisonment for a period of two years, 18 months of which were suspended. The respondent served six months at McNeil Island Penitentiary and thereafter was placed on probation for 18 months. He testified that he was last admitted to the United States as a visitor in January of 1971 (p. 26).

The Order to Show Cause charges that the respondent is subject to deportation in that at the time of entry he was excludable under section 212(a)(20) of the Immigration and Nationality Act as an immigrant not in possession of a valid unexpired immigrant visa and under section 212(a)(22) of the Act as an alien who departed from or remained

outside of the United States to avoid or evade training or service in the armed forces. The special inquiry officer found the respondent deportable on both charges.

The special inquiry officer concludes that the respondent abandoned his permanent residence when he departed from the United States in 1966 to avoid training or service in the armed forces of this country (p. 3, special inquiry officer's opinion). The record establishes, however, that the respondent was convicted in September of 1968 for refusal to submit to induction on June 14, 1968 (see record of conviction attached to Ex. 5). The question arises as to whether the respondent would be liable to induction if he were not a permanent resident alien in 1968.

The fact that the respondent may not have been a permanent resident alien did not relieve him from the duty of submitting for induction into the armed forces. The applicable statute, section 12, Universal Military Training and Service Act, 50 U.S.C. App., section 462, reads in pertinent part:

> "Any . . . *person* . . . who . . . evades . . . service in the armed forces or any requirements of this title . . . or of said rules, regulations or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations or directions made pursuant to this title . . . shall upon conviction . . . be punished by imprisonment . . . ." (Emphasis supplied.)

An induction order imposes a continuing duty on a "registrant" to submit for induction regardless of the fact that he may have abandoned his permanent residence following a departure to evade service in the armed services. Cf. *White v. United States*, 403 F.2d 1005 (8 Cir. 1968), cert. denied 89 S.Ct. 1196 (1969); *United States v. Prince*, 398

F.2d 686 (2 Cir. 1968); *Silverman v. United States*, 220 F.2d 36 (8 Cir. 1955). The Selective Service regulations implementing section 12 of the Universal Military Training and Service Act, supra, provide in substance that it is a continuing duty of all "registrants" to report for and submit to induction "regardless of the time when or the circumstances under which a registrant fails or failed to report for induction pursuant to an Order to Report for Induction," 32 C.F.R. 1642.2 and 1642.15. Under the statute and the regulations the order for the respondent to report for induction in 1968 was proper regardless of his resident status at that time.

Counsel contends that the respondent is not subject to deportation pursuant to section 212(a)(22) of the Immigration and Nationality Act because he departed from the United States for the primary purpose of attending college in Canada and not for the purpose of avoiding or evading training or service in the armed forces of the United States. Counsel relies on the Board's decision in *Matter of Nunez-Toro*, 11 I&N Dec. 501, 503 (BIA 1966), which holds that an exclusion or deportation pursuant to section 212(a)(22) may occur only if the alien's "*primary purpose* for departing or remaining abroad was to avoid training or service in the armed forces." (Emphasis supplied.)

We find no support in the evidence for counsel's contention. The respondent testified in an exclusion proceeding on October 11, 1966 (p. 10, Ex. 3) as follows:

> "On 6 September I left for Canada because I didn't want to report [for induction], and I didn't want to stick around California . . . I felt they [Selective Service] would pull me out of school. I tried to go to the University of British Columbia but I was too late to register."

We note that on this occasion the respondent was applying for admission as a nonimmigrant student to resume his studies at Stanford University (p. 3 of Ex. 3). When questioned as to how long he had been in a state of mind that he would not serve in the armed forces of the United States, the respondent replied, "it is hard to pin point, but probably the 1st of September of this year [1966]" (p. 12, Ex. 3). The respondent departed for Canada on September 2, 1966. He surrendered his alien registration receipt card (Form I-151) at the office of the Immigration and Naturalization Service in Vancouver, B.C., Canada on September 6, 1966. He stated on this occasion that he was abandoning his residence in the United States (Ex. 2).

The respondent's testimony at the deportation hearing of July 7, 1971 is of the same tenor. He testified, "I wasn't going to serve in the Armed Forces of the United States" (p. 16). When questioned as to whether he really went to Canada to avoid the draft, the respondent answered:

> A. . . . what was in my mind was that I wanted to continue going to school and the United States wasn't going to permit me going to school . . . anywhere.
> Q. Because they were going to draft you?
> A. Sure.

The respondent's testimony, his conviction for refusing to submit to induction and his statement on the questionnaire, dated August 30, 1966, which accompanied the Selective Service order to report for induction (Ex. 4)[1] satisfy us that deportability under section 212(a)(22) has been established by evidence that is clear, unequivocal and convincing.

---

1. Under remarks (section 20) the respondent stated, "I will refuse to comply with any decision reached by the 'Selective Service Bureau' as I feel conscription is amoral and totally unjustified."

We find no merit to counsel's contention that the Government is estopped from deporting the respondent. Counsel's argument in this regard is based upon claims (1) that the respondent was expressly assured that he would not be deported if he pleaded guilty to the charge of refusing to submit to induction and serve his sentence; (2) that the respondent was not advised that he could have applied to be relieved from liability for training and service under section 4(a) of the Selective Service Act of 1967; and (3) that the excessive delay in instituting deportation proceedings until after the completion of criminal action against the respondent caused severe detriment to him.

The only evidence supporting the respondent's claim that he was assured immunity from deportation in return for a plea of guilty in the criminal action is his self-serving declaration (p. 19). The special inquiry officer stated for the record that he would reopen the proceeding for corroborating evidence, provided the respondent could produce such evidence within 30 days (p. 30). To date no such evidence has been submitted. Furthermore, the public defender, who it is alleged gave the assurance, has no authority to enter into any agreement which would bind the Government.

The respondent was not eligible for relief under section 4(a) of the Selective Service Act because at the time he refused to submit to induction, he was not a nonimmigrant. Furthermore, if the respondent had been in a position to claim exemption from military service under section 4(a) of the Selective Service Act, he would now be subject to deportation based on inadmissibility under section 212(a)(22) as an alien ineligible for citizenship.

We find no excessive delay in commencing deportation proceedings in this case. There is no statutory period within which a deportation proceeding must be instituted under

section 241(a) of the Immigration and Nationality Act. The respondent testified that he last entered the United States in January of 1971 (p. 26). He was admitted as a nonimmigrant visitor to visit his parents. The Order to Show Cause was served upon him in April of 1971. He testified that if permitted he wished to enroll at Stanford University (p. 28).

Our review of the record and briefs satisfies us that the hearing was fair, that deportability on both charges has been established by clear, convincing and unequivocal evidence, and that the special inquiry officer properly applied the pertinent legal principles. We affirm the special inquiry officer's finding that the respondent is not eligible for voluntary departure under the provisions of section 101(f)(7) of the Act. He is precluded from establishing good moral character for the statutory period as an alien who has been confined to a penal institution for an aggregate period of 180 days. An appropriate order will be entered.

ORDER: The appeal is dismissed.

MAURICE A. ROBERTS

Chairman

Appendix D

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

File: A8 464 157—San Francisco, California

September 2, 1971

In the Matter of
JAMES SPENCER DUNN
Respondent

IN DEPORTATION PROCEEDINGS

CHARGES: I&N Act—Section 241(a)(1)—excludable at time of entry—no immigrant visa

—departed to avoid training or service in the Armed Forces

APPLICATION: Te be permitted to remain in the United States, or as an alternative, voluntary departure in lieu of deportation

IN BEHALF OF THE RESPONDENT:
George Fisher, Esq.
P. O. Box 1320
Palo Alto, California 94302

IN BEHALF OF THE SERVICE:
Bernard J. Hornbach, Esq.
Trial Attorney
San Francisco, California

DECISION OF THE SPECIAL INQUIRY OFFICER

The respondent is a native and citizen of Canada, age 27, single, who was admitted to the United States for permanent residence at Detroit, Michigan on April 8, 1953.

The record reveals that on August 24, 1966 his local Selective Service Board ordered him to report for induction on September 28, 1966. On August 30, 1966 he informed the Board that he would refuse to comply with any decision reached by the "Selective Service Bureau" as he felt that conscription was amoral and totally unjustified. On September 2, 1966 he departed for Canada. He appeared at the office of the Immigration and Naturalization Service at Vancouver B. C., Canada on September 6th and advised that he was abandoning his residence in the United States and then turned in his Form I-151 (Alien Registration Receipt Card). He has subsequently returned to the United States on a number of occasions, the last time being about January of 1971.

On September 6, 1968, upon a plea of guilty, the respondent was convicted in the United States District Court for the Northern District of California for violating Section 462 of Title 20, Appendix U.S.C. (refusal to submit to induction) and was sentenced to be, among other things, imprisoned for a period of two years, six months to be served in a jail type institution. The remainder of the sentence was suspended and he was placed on probation for a period of eighteen months. He testified that he served the six months.

At the hearing before me, the respondent testified among other things that he went to Canada because he wanted to continue going to school and the United States would not permit this because they were going to draft him. When he last returned to the United States he was admitted after stating that he was coming to visit his parents. It was then his intention to enroll at a university in the United States. He attended the winter and spring quarters at Stanford this year and may enroll for the fall quarter.

The respondent abandoned his residence when he left the United States in 1966. At the time of his last entry he was coming here to remain indefinitely. Consequently, he was, in fact, an immigrant and required to be in possession of an immigrant visa. Since he did not have such a document he is deportable on the first charge set forth in the Order to Show Cause. He is also deportable on the second charge in the Order to Show Cause since it is clear that he departed from the United States to avoid training or service in the Armed Forces of this country.

The respondent has not been convicted of any offense other than his refusal to submit to induction. He has not sought employment since returning to the United States because he does not know whether, in his status, the law would permit him to work. His parents, who are lawful permanent residents, reside in Chicago. The record seems to indicate that he is a somewhat idealistic but misguided young man with a penchant for botching up his life.

There does not appear to be any provision of the immigration law under which the respondent can be permitted to remain in the United States. He has requested that he be allowed to depart voluntarily at his own expense in lieu of being deported, but he is not statutorily eligible for this privilege because his imprisonment for six months brings him within the purview of Section 101(f)(7) of the Immigration and Nationality Act. Accordingly, I have no alternative except to enter an order for his deportation.

IT IS ORDERED that the respondent be deported from the United States to Canada on the charges set forth in the Order to Show Cause.

CHESTER SIPKIN
Chester Sipkin
Special Inquiry Officer

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1728

JAMES SPENCER DUNN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a native and citizen of Canada, contends that he has the status of a permanent resident alien and as such is not subject to deportation.

1. Deportation proceedings were instituted against petitioner and an Order to Show Cause was issued charging that he was deportable under 8 U.S.C. 1251(a)(1) as an immigrant who at the time of his last entry was not in possession of a valid immigrant visa required under 8 U.S.C. 1182(a)(20), and on the additional charge that petitioner was excludable from the United States under 8 U.S.C. 1251(a)(1) in that he was an alien who had departed or remained outside the United States to avoid or evade training or service in the Armed Forces in a time of war or a period declared by the President to be a national emergency under 8 U.S.C. 1182(a)(22).

On September 2, 1971 the special inquiry officer ordered that petitioner be deported from the United States on the charges set forth in the Order to Show Cause (Pet. App. D).[1] On June 19, 1972 the Board of Immigration Appeals dismissed petitioner's appeal from that order (Pet. App. C). The court of appeals affirmed (Pet. App. A).

2. Petitioner entered the United States in 1953 on a permanent resident visa. On August 24, 1966, his local Selective Service Board ordered him to report for induction on September 28, 1966. Petitioner informed the Board that he would not submit to induction because he felt that conscription was immoral and totally unjustified. On September 2, 1966, he departed for Canada. He appeared at the office of the Immigration and Naturalization Service at Vancouver, B.C., Canada on September 6, 1966, and advised that he was adandoning his residence in the United States and then turned in his Form I-151 (Alien Registration Receipt Card) (Pet. App. D 8-9).

Petitioner failed to report for induction as ordered and was indicted in the United States District Court for the Northern District of California for refusing to submit to induction, in violation of 50 U.S.C. App. 462. He was convicted on September 6, 1968 upon his plea of guilty and sentenced to imprisonment for a period of two years, 18 months of which were suspended. He served six months at McNeil Island Penitentiary and thereafter was placed on probation for 18 months. Petitioner was last admitted to the United States as a visitor in January, 1971 (Pet. App. D 9).

---

[1] "Pet. App. D" designates the findings of the special inquiry officer.

3. Petitioner contends that he could have been convicted of draft evasion only if he were a permanent resident alien and that the conviction is thus proof that he has the status of a permanent resident alien and, as such, is not subject to deportation. But, petitioner was subject to prosecution for failure to report for induction despite the fact that he had relinquished his resident status in the United States. As the opinion of the Board of Immigration Appeals noted (Pet. App. C 3-4):

> The fact that the respondent may not have been a permanent resident alien did not relieve him from the duty of submitting for induction in the armed forces. The applicable statute, section 12, Universal Military Training and Service Act, 50 U.S.C. App., section 462, reads in pertinent part:
>
> > "Any * * * *person* * * * who * * * evades * * * service in the armed forces or any requirements of this title * * * or of said rules, regulations or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations or directions made pursuant to this title * * * shall upon conviction * * * be punished by imprisonment * * *." (Emphasis supplied.)

An induction order imposes a continuing duty on a "registrant" to submit for induction regardless of the fact that he may have abandoned his permanent residence following a departure to evade service in the armed services. Cf. *White* v. *United States*, 403 F. 2d 1005 (8 Cir. 1968), cert. denied 89 S. Ct. 1196 (1969); *United States* v. *Prince*, 398 F. 2d 686 (2 Cir. 1968); *Silverman* v. *United States*, 220 F. 2d 36 (8 Cir. 1955). The Selective

> Service regulations implementing section 12 of the Universal Military Training and Service Act, *supra*, provide in substance that it is a continuing duty of all "registrants" to report for and submit to induction "regardless of the time when or the circumstances under which a registrant fails or failed to report for induction pursuant to an Order to Report for Induction," 32 C.F.R. 1642.2 and 1642.15.

4. Petitioner's assertion that his guilty plea was induced by a promise that he would not be deported is supported only by petitioner's own self-serving statements and was specifically rejected by the Board of Immigration Appeals as follows (Pet. App. C 6):

> The only evidence supporting the respondent's claim that he was assured immunity from deportation in return for a plea of guilty in the criminal action is his self-serving declaration * * * . The special inquiry officer stated for the record that he would reopen the proceeding for corroborating evidence, provided the respondent could produce such evidence within 30 days * * * . To date no such evidence has been submitted. Furthermore, the public defender, who it is alleged gave the assurance, has no authority to enter into any agreement which would bind the Government.

5. Petitioner further alleges that he was not advised that he could have applied to be relieved from liability for training and service under Section 4(a) of the Military Selective Service Act of 1967, 50 U.S.C. App. 454(a). The government was under no duty to inform petitioner of his alternatives to military service. In any event resort to that provision of law does not enhance petitioner's claim that he is not deportable, for Section 4(a) also provides that " * * * any alien who makes such

application shall thereafter be debarred from becoming a citizen of the United States." Thus petitioner would now be subject to deportation based upon his inadmissibility to the United States under 8 U.S.C. 1182(a)(22) as an alien ineligible for citizenship. Petitioner's argument is, therefore, unavailing, since any benefit he might have received under 50 U.S.C. App. 454(a) would have automatically resulted in deportation under the same section of law pursuant to which he has now been ordered deported.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.